

IN THE WATER COURT OF THE STATE OF MONTANA
CLARK FORK DIVISION
KOOTENAI RIVER BASIN (76D)
PRELIMINARY DECREE

* * * * *

CLAIMANT: Robert G. McKinzie

OBJECTOR: United States of America (USDA Forest Service)

CASE 76D-0068-R-2022
76D 7721-00

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusions of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days to be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must serve a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

MASTER'S REPORT

Water Right Claim 76D 7721-00 appeared in the Preliminary Decree for the Kootenai River Basin (Basin 76D) issued May 6, 2021. This claim received an issue

remark. Issue remarks result from Department of Natural Resources and Conservation (“DNRC”) claims examination or by Water Court order. Claims examination confirms the historical use of water right claims and identifies issues with claims. If claims examination cannot confirm some aspect of a claim, an issue remark is added to the claim. This claim also received an objection filed by the United States of America (USDA Forest Service).

The Court consolidated this claim into Water Court Case 76D-0068-R-2022 on October 27, 2022. The Court held an initial status conference on December 1, 2022. Claimant did not appear to the conference. As a result of discussions had during the conference with counsel for Objector, the Court set a show cause deadline. Claimant did not file anything by the deadline.

FINDINGS OF FACT

1. Claim 76D 7721-00 appeared with the following issue remark:
SOURCE NAME WAS MODIFIED AS A RESULT OF DNRC REVIEW UNDER MONTANA WATER COURT REEXAMINATION ORDERS. IF NO OBJECTIONS ARE FILED TO THIS CLAIM, THESE ELEMENTS WILL REMAIN AS THEY APPEAR ON THIS ABSTRACT AND THE REMARK WILL BE REMOVED FROM THE CLAIM.
2. The United States objected to the maximum acres, means of diversion, place of use, and point of diversion of this claim.
3. During the status conference held on December 1, 2022, Objector stated that the place of use legal land descriptions should be refined to match the point of diversion legal land descriptions. Such modifications would resolve the objection to this claim. Objector requested the Court set a show cause deadline requiring Claimant input.
4. The Court issued an order setting a Show Cause deadline on December 1, 2022. The order included the proposed modifications and indicated that if Claimant did not respond the Court would modify Claim 76D 7721-00 as requested by Objector. Claimant did not respond by the January 30, 2023 deadline.
5. Claim 76D 7721-00 is for a livestock direct form source water right. Points of diversion and places of use for these types of rights should match. *See* Rule 22, W.R.C.E.R.

6. The point of diversion of Claim 76D 7721-00 appeared in the Preliminary Decree as follows:

Point of Diversion and Means of Diversion:

| <u>ID</u> | <u>Govt Lot</u> | <u>Qtr Sec</u> | <u>Sec</u> | <u>Twp</u> | <u>Rge</u> | <u>County</u> |
|-----------------------------|-----------------|------------------------------|------------|------------|------------|---------------|
| 1 | | SWSW | 2 | 34N | 26W | LINCOLN |
| Period of Diversion: | | JANUARY 1 TO DECEMBER 31 | | | | |
| Diversion Means: | | LIVESTOCK DIRECT FROM SOURCE | | | | |
| 2 | | N2NW | 11 | 34N | 26W | LINCOLN |
| Period of Diversion: | | JANUARY 1 TO DECEMBER 31 | | | | |
| Diversion Means: | | LIVESTOCK DIRECT FROM SOURCE | | | | |
| Period of Use: | | JANUARY 1 TO DECEMBER 31 | | | | |

7. The place of use of Claim 76D 7721-00 should be described as follows:

Place of Use:

| <u>ID</u> | <u>Acres</u> | <u>Govt Lot</u> | <u>Qtr Sec</u> | <u>Sec</u> | <u>Twp</u> | <u>Rge</u> | <u>County</u> |
|-----------|--------------|-----------------|----------------|------------|------------|------------|---------------|
| 1 | | | SWSW | 2 | 34N | 26W | LINCOLN |
| 2 | | | N2NW | 11 | 34N | 26W | LINCOLN |

8. The issue remark should be removed from this claim.

APPLICABLE LAW

1. A properly filed statement of claim is prima facie proof of its content. Section 85-2-227, MCA. The prima facie status of a claim may be overcome by a preponderance of the evidence. Section 85-2-227, MCA; Rule 19, W.R.Adj.R. A preponderance of the evidence is evidence that shows a fact is “more probable than not.” *Hohenlohe v. State*, 2010 MT 203, ¶ 33, 357 Mont. 438, 240 P.3d 628.

2. The Water Court must weigh an issue remark, and the information resulting in that issue remark, against the claimed water right. Section 85-2-247(2), MCA.

3. The Water Court must resolve all issue remarks not resolved through the objection process. Section 85-2-248, MCA. The Court must review information in the claim file or obtained by the Court to determine if there is a sufficient basis to resolve the remarks. 85-2-248(3), MCA.

4. The Water Court has the authority to hear all objections to the elements of any claim included in a Court issued Temporary Preliminary Decree or Preliminary Decree. Section 85-2-233, MCA.

CONCLUSIONS OF LAW

1. The changes described in the Findings of Fact may be made because the evidence in the record overcomes the prima facie status of the claim by a preponderance of the evidence.

2. The evidence in the record provides the Court with a sufficient basis to resolve and remove the issue remark from the above-captioned claim.

RECOMMENDATIONS

Based upon the above Findings of Fact and Conclusions of Law, this Master recommends that the Court make the changes specified in the Findings of Fact to correct the Preliminary Decree for this Basin. A post-decree abstract of Water Right Claim is served with this Report to confirm the recommended changes have been made in the state's centralized record system.

ELECTRONICALLY SIGNED AND DATED BELOW.

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**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
KOOTENAI RIVER
BASIN 76D**

Water Right Number: 76D 7721-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: ROBERT G MCKINZIE
630 VALLEY MALL PKWY #200
EAST WENATCHEE, WA 98802 4838

Priority Date: MAY 1, 1970

Type of Historical Right: USE

Purpose (use): STOCK

Flow Rate: A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS OF STOCK DRINKING DIRECTLY FROM THE SOURCE, OR FROM A DITCH SYSTEM. THE FLOW RATE IS LIMITED TO THE MINIMUM AMOUNT HISTORICALLY NECESSARY TO SUSTAIN THIS PURPOSE.

Volume: THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

Source Name: LOON LAKE

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

| <u>ID</u> | <u>Govt Lot</u> | <u>Qtr Sec</u> | <u>Sec</u> | <u>Twp</u> | <u>Rge</u> | <u>County</u> |
|-----------|-----------------|----------------|------------|------------|------------|---------------|
| 1 | | SWSW | 2 | 34N | 26W | LINCOLN |

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: LIVESTOCK DIRECT FROM SOURCE

| | | | | | | |
|---|--|------|----|-----|-----|---------|
| 2 | | N2NW | 11 | 34N | 26W | LINCOLN |
|---|--|------|----|-----|-----|---------|

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: LIVESTOCK DIRECT FROM SOURCE

Period of Use: JANUARY 1 TO DECEMBER 31

Place of Use:

| <u>ID</u> | <u>Acres</u> | <u>Govt Lot</u> | <u>Qtr Sec</u> | <u>Sec</u> | <u>Twp</u> | <u>Rge</u> | <u>County</u> |
|-----------|--------------|-----------------|----------------|------------|------------|------------|---------------|
| 1 | | | SWSW | 2 | 34N | 26W | LINCOLN |
| 2 | | | N2NW | 11 | 34N | 26W | LINCOLN |